

AUG 05 2008

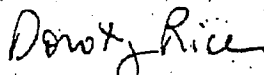
Certification, we must have ample time to consider any environmental effects and, when acting as the lead agency under CEQA, must prepare the proper environmental documents. One requirement for preparing environmental documents for CEQA compliance is a notice and comment period which cannot be less than 30 days. This notice and comment period cannot begin until after staff have had a chance to conduct their analysis. (California Code Regulations, Title 14, § 15073.) Given the requested response date in your letter dated June 27, 2008, it is not possible for the State Water Board to comply with CEQA within the requested time frame.

State Water Board regulations only permit us to either approve or deny a request for Water Quality Certification before the federal period for Certification expires. (California Code Regulations, Title 23, § 3859.) Because of our inability to comply with the requirements of CEQA during the time limit prescribed (45 days from the date that the draft permits were mailed to the State Water Board), we have no choice but to deny without prejudice the Water Quality Certification for the General Permits unless we can receive an extension on the federal period set forth in your letter. If we receive such an extension, then State Water Board staff could conceivably comply with CEQA requirements and certify the General Permits with conditions that ensure compliance with existing State statutes and water quality plans and policies. A minimum extension of 18 months would be needed in order to complete the CEQA environmental analysis required for the activities authorized by these General Permits. If the above requested extension of federal time-period is submitted to this office within one year of the date of this denial, we will reactivate your application and take appropriate action. If one year passes without evidence of compliance, a new application and associated fees for Certification will be required. Please notify us if USEPA plans to grant such an extension.

State Water Board staff have concerns about the General Permits, and have submitted comments to USEPA under docket OW-2008-0055 and docket OW-2008-0056. We will send you a copy of both comment letters.

If you require further assistance, please contact Renan Jauregui, the staff person most knowledgeable on the subject, at (916) 341-5505 (riauregui@waterboards.ca.gov). You may also contact Phil Isorena, Chief of the NPDES Unit, at (916) 341-5544 (pisorena@waterboards.ca.gov).

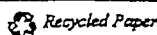
Sincerely,



Dorothy Rice
Executive Director

cc: (See next page)

California Environmental Protection Agency



Mr. Douglas E. Eberhardt

- 3 -

AUG 05 2008

cc: (Continuation page)

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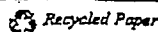
Mr. John Robertus
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Mr. Darrin Polhemus
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California Environmental Protection Agency





Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

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Arnold Schwarzenegger
Governor

AUG 1 2008

Water Docket EPA-HQ-CW-2008-0055
Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460

To Whom It May Concern

COMMENTS ON THE PROPOSED VESSEL GENERAL PERMIT (VGP)

Thank you for the opportunity to comment on the draft VGP. The enclosed document provides the State Water Resources Control Board's (State Water Board) comments on the draft VGP.

On June 27, 2008, the State Water Board received a letter requesting the issuance of a water quality certification pursuant to Clean Water Act Section 401 from Mr. Douglas Eberhardt from the United States Environmental Protection Agency's (USEPA) Region 9 Office. State Water Board staff will be issuing a letter denying the certification request without prejudice for specified reasons. The primary reason for issuing this denial was the compressed time-schedule for states to respond to this proposed rule, which has resulted in insufficient time for the State Water Board to comply with the California Environmental Quality Act (CEQA).

If you have questions on the above and the detailed comments in the attached document, please contact me at (916) 341-5458 (dpolhemus@waterboards.ca.gov) or Kim Ward, the staff most knowledgeable on this subject, at (916) 341-5586 (kward@waterboards.ca.gov).

Sincerely,

Darrin Polhemus, Deputy Director
Division of Water Quality

Enclosure

cc: Mr. Doug Eberhardt, USEPA
USEPA REGION 9
75 Hawthorne Street
Mail Code: WTR-5
San Francisco, CA 94105

California Environmental Protection Agency

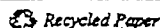


EXHIBIT NO.	31
APPLICATION NO.	
	CD 42 08

Enclosure

Docket ID No. EPA-HQ-OW-2008-0055

COMMENTS ON THE DRAFT NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) GENERAL PERMIT FOR DISCHARGES INCIDENTAL TO THE NORMAL OPERATION OF COMMERCIAL VESSELS AND LARGE RECREATIONAL VESSELS (VGP)

State Water Board staff has the following comments:

1. **California Clean Coast Act of 2005.** Certain permit provisions conflict with California law. Specifically, some of the waste streams listed in the VGP are prohibited from being discharged from vessels under the "California Clean Coast Act of 2005" or Act [Public Resources Code (PRC) Section 72400 et seq.]. Thus, in California, waste streams discharged from certain classes of large commercial vessels would make these vessels ineligible for NPDES permits. Waste streams prohibited from discharges from large commercial vessels include hazardous waste as defined under Section 25177 of the California Health and Safety Code (HSC), oily bilgewater, "other wastes" (these are subsets of "hazardous wastes"), and discharges of graywater from cruise ships. For other large commercial vessels regulated under the California Clean Coast Act of 2005, the discharge of graywater is prohibited if the vessel possesses sufficient holding capacity to refrain from discharging.

Hazardous wastes, whether regulated under the federal Resource Conservation and Recovery Act (RCRA) and/or regulated as "non-RCRA" hazardous wastes in California pursuant to HSC Section 25117 et seq., may be present in vessel waste streams such as those studied for purposes of the Department of Defense's Uniform National Discharge Standards' (UNDS) technical reports and in USEPA's Draft Cruise Ship Discharge Assessment Report. Because of the apparently limited information now available on specific waste streams associated with the other major classes of commercial vessels, it is unclear how many of these "incidental" waste streams would be prohibited from discharge under the California Clean Coast Act of 2005. However, information obtained from the UNDS technical reports and the USEPA's Draft Cruise Ship Discharge Assessment Report indicates that these wastes may be present in several of the 28 waste streams; particularly noteworthy is the latter report's identification of potential RCRA hazardous waste constituents in graywater on cruise ships.

2. **California Marine Invasive Species Act of 2003 and Ballast Discharges.** The proposed permit may also conflict with California law regarding ballast water. Under the Marine Invasive Species Act (PRC Section 71204.7 et seq.), which is primarily administered by the California State Lands Commission, regulations have been adopted to ensure that ballast water exchanges are conducted in a way that minimizes the risk of transmission of nonindigenous species via this process, and

which also set performance standards for the treatment of ballast water to further reduce the release of nonindigenous species.

PRC Section 71201.5 disallows the discharge of "oil, noxious liquids, or other pollutants in a manner prohibited by state, federal, or international laws or regulations."

However, USEPA states (p. 27 of the VGP *Factsheet*) that ballast water discharges may contain "rust inhibitors, flocculent compounds, epoxy coating materials, zinc or aluminum (from anodes), iron, nickel, copper, bronze, silver, and other material or sediment from inside the tank, pipes, or other machinery." Such discharges may violate one or more laws or regulations mentioned above.

3. There are differences between the definitions of the large commercial vessels regulated under the California Clean Coast Act of 2005 and the VGP. For example, "Large passenger vessels" [PRC Section 72410(f)] have a capacity of "300 gross registered tons or greater" and are "engaged in the carrying of passengers for hire." An "Oceangoing ship" [PRC Section 72410(j)] is a "private, commercial, government, or military vessel of 300 gross registered tons or more calling on California ports or places." By contrast, the VGP (depending on the type of waste stream under consideration) regulates vessels of either 300 or 400 gross registered tons or greater, and large passenger ferries of 100 gross registered tons or greater, and so on.
4. **Deficiencies in Technical Information Needed for Determining Effluent Limits.** USEPA references technical reports prepared by the Department of Defense on the 28 waste streams in preparation for the adoption of vessel discharge regulations for armed forces vessels under the UNDS program. Although there is undoubtedly some similarity between many of the waste streams generated by both vessel fleets, there are also some notable differences. For example, in the chemical composition of hydraulic fluids typically used in specialized military applications when compared with less expensive hydraulic fluids used in general commerce such as the transportation industry. In addition, certain waste streams generated by cruise ships (i.e., sewage, graywater, hazardous waste, oily bilgewater, and solid waste) are described in USEPA's December 2007 Draft Cruise Ship Discharge Assessment Report. However, information on these same waste streams generated by other classes of commercial vessels (California's records indicate these vessels consist mainly of container ships, tankers, and bulk-carriers operating within California's navigable waters) seems somewhat lacking. Therefore, State Water Board staff members are concerned that, at present, there may be insufficient technical information on some of the waste streams for purposes of adopting appropriate effluent limits as described in the proposed VGP.
5. **Potential Water Quality Effects of 28 VGP Waste Streams.** Although the intent of the VGP is to protect receiving water quality from pollutants discharged in 28 separate vessel waste streams listed as "incidental to the normal operation of a

vessel," State Water Board staff members have concerns that some of the best management practices listed may themselves cause detrimental environmental effects. It should be noted that this is particularly problematic in those segments of water bodies listed under Clean Water Act (CWA) Section 303(d) as impaired due to copper and pollutants such as pathogens, which may be partly attributable to on-going vessel discharges. Many of these pollutants are currently attributed to undifferentiated "nonpoint sources" or "unknown" sources pursuant to CWA Section 303(d) that are awaiting further investigation normally undertaken during the development of subsequent Total Maximum Daily Load allocations. Two examples of discharges "incidental to the normal operation of a vessel" that may continue to contribute to significant water quality impairments due to releases of copper and microbial pathogens are: (1) in-water boat hull cleaning of vessels coated with copper-based anti-foulant paints; and (2) discharges of untreated graywater.



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

Division of Water Quality

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Arnold Schwarzenegger
Governor

August 1, 2008

Water Docket ID No. EPA-HQ-OW-2008-0056
U.S. Environmental Protection Agency
Mail Code: 4101T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

To Whom It May Concern:

WATER DOCKET ID NO. EPA-HQ-OW-2008-0056

Thank you for the opportunity for the State Water Resources Control Board staff to comment on the proposed Recreational General Permit (RGP). We appreciate the U.S. Environmental Protection Agency's efforts in developing these important regulations. While the intent of the RGP is to protect the marine environment, we have some concerns over its administration, and some of the technical components of this permitting program. Although we believe that a regulatory permit will improve existing voluntary programs for recreational vessels, we need more time to evaluate the required best management practices (BMPs). California's unique ecosystems, extensive water conveyance systems, large population of recreational vessels, and mild climate (leading to year-round mooring of recreational vessels) apparently were not considered when developing this RGP. In fact, many of the assumptions used to develop the BMPs did not consider the large amount of recreational vessels that are moored year-round as well as liveaboards.

Administrative Issues:

- 1) The following classes of recreational vessels should be exempt from the RGP because only a few of the BMPs in Section 2.1.3 (Trash Management) and Section 2.1.4 (Deck and Hull Cleaning and Preventing Transport of Visible Living Organisms) may apply to these classes of recreational vessels.
 - Any vessel propelled manually, including kayaks, canoes, rowboats, surfboards or sailboards.
 - Sailboats with no motor and eight feet or less in length.
 - A ship's lifeboat (i.e. dingy).

California Environmental Protection Agency

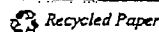


EXHIBIT NO. 4
APPLICATION NO.
CD-42-08

Requiring these recreational vessel owners to abide by the terms of the RGP is inappropriate and inefficient.

2) How are dischargers going to be aware of and understand the BMPs required under this RGP?

The RGP should be accompanied with a companion document intended to clearly communicate the requirements to the lay boater. The State may require the Department of Motor Vehicles (DMV) to issue this companion document as a component of the vessel registration process. This companion document should include the appropriate state (rather than federal) contacts and resources.

3) There is no mechanism to track or enforce the RGP if a Notice of Intent is not required of the discharger. Perhaps a Memorandum of Agreement between the State and the DMV could be used to help gather basic data on vessel class, size, location, owner information, type of anti-foulant coating used (if any), and mooring location (if applicable).

4) The RGP should explain in more detail, the requirements contained in Clean Water Act §1322. Since this RGP is intended for recreational vessel owners and could have extensive readership, it should contain as much information as possible regarding the potential water polluting activities associated with boating. Bacteria and pathogens are a water quality concern for poorly flushed marinas and boat basins throughout California. Improper use and installation of marine sanitation devices on liveaboards and vessels moored seasonally or permanently are thought to be contributing to bacteria and pathogen loading in some of these marinas and boat basins.

Technical Issues:

1) Copper (both dissolved and total) concentrations in the majority of marinas located in salt and brackish waters exceed the California Toxics Rule (CTR) values. Some freshwater marinas also have copper concentrations that exceed CTR values (California Department of Pesticide Regulations, Draft Report on Copper-based Antifoulant Paints 2008). BMPs provided in Section 2.1.5 (Vessels with Anti-foulant Paint) may not be protective enough to limit copper-discharges related to underwater hull cleaning of vessels coated with copper-based anti-foulant paint. Additionally, due to California's mild climate, many vessels are moored year-round and/or are liveaboards. Passive leaching of copper from vessels coated with copper-based anti-foulant paint is thought to contribute to elevated levels of dissolved copper found in many of California's marinas and boat basins. Numeric effluent limits may be more appropriate for copper than BMPs especially for vessels moored year-round and

liveaboards. Implementation of the following BMPs, in addition to those listed in Section 2.1.5, may limit the release of copper and improve water quality:

- Store infrequently used vessels on land.
- "Soft" sloughing and ablative (self polishing) hull paints release copper when cleaned underwater. Refrain from underwater cleaning if using these paints.
- Use hard finish, conventional anti-fouling paints rather than soft sloughing and ablative (self polishing) hull paints.
- Hire only certified professional underwater vessel hull cleaning services to perform underwater hull cleaning activities.
- Do not sand or strip hull paint underwater.
- Use stainless steel brushes and pads on non-painted, metal areas *only*.
- Repair paint bonding problems at haul-out areas to avoid further chipping and flaking of paint into the water.

Please refer to <http://commserv.ucdavis.edu/cesandiego/seagrant/hullclean.htm> for more information on the BMPs listed above.

2) The term "waste stream" in Section 2.1.3 is confusing. If the intention is to make sure that this waste ends up in the appropriate waste stream, i.e., the municipal landfill rather than the open ocean or marina basin, then please clarify and/or define "waste stream" or replace with "discharges" to be consistent.

3) Section 2.1.4 (Deck and Hull Cleaning and Preventing Transport of Visible Living Organisms) may not be protective enough to prevent the potential spread of quagga mussels. Particularly in the following reservoirs which have bans on recreational boating: Lake Casitas and Westlake Lake. For more information, please refer to <http://www.dbw.ca.gov/BoaterInfo/QuaggaLoc.aspx>.

Suggestion: zero discharge for transport of quagga mussels in waterbodies with active bans on recreational boating due to potential quagga mussel infestation.

- Modify the second bullet, "Inspect the visible areas of the vessel for any attached or stowaway visible living organisms. If organisms are found, they must be removed *and disposed of in appropriate trash receptacle on-land.*"
- Modify the third-bullet of the third bullet, "Rinse hull with a high-pressure spray of hot tap water after each use when possible."
- Add the following bullet; "Check with the appropriate waterway management agency prior to launching boat; some inland reservoirs and lakes have bans and restrictions on recreational boating."

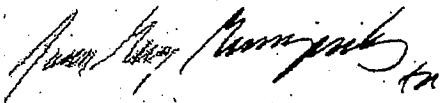
August 1, 2008

4) Section 2.1.7 (Graywater) is not protective of Lake Shasta where there is a prohibition on graywater discharges.

Suggestion: Numeric limit for Lake Shasta, zero discharge.

If you have questions regarding our comments, please contact me at (916) 341-5615 (drice@waterboards.ca.gov) or Molly Munz, the staff person most knowledgeable on this subject, at (916) 341-5485 (MMunz@waterboards.ca.gov).

Sincerely,



Darrin Polhemus, Deputy Director
Division of Water Quality

cc: Mr. Doug Eberhardt
USEPA Region 9
75 Hawthorne Street
Mail Code: WTR-5
San Francisco, CA 94105

ENCLOSURE 3

San Francisco Bay Conservation and Development Commission Consistency Determination on the Vessel General Permit



Making San Francisco Bay Better

December 12, 2008

United States Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105-3901

ATTENTION: Douglas E. Eberhardt, Chief, NPDES Permit Office

SUBJECT: Consistency Determination No. CN 7-08

Dear Mr. Eberhardt:

On September 2, 2008, the United States Environmental Protection Agency (EPA) submitted a proposed National Pollution Discharge Elimination System (NPDES) Vessel General Permit (VGP) and requested that the Commission concur that the proposed permit is consistent with its Amended Coastal Zone Management Program for San Francisco Bay. The Commission concurs with the determination of the EPA that the Vessel General Permit to regulate discharges incidental to the normal operation of commercial vessels 79 feet or greater in length, except non-ballast water discharges from commercial fishing vessels and discharges from recreational vessels in San Francisco Bay is consistent with the Commission's Amended Management Program for San Francisco Bay, if the permit is modified to be consistent with certain conditions contained in the attached determination. BCDC retains the right to reopen, revise or revoke this consistency determination if the terms and conditions of the Final VGP are modified substantially.

The Commission's conditional consistency determination is attached. If you should have any questions regarding the attached Agreement or need any further assistance, please contact Tim Eichenberg of my staff at 415/352-3655 or time@bcdca.gov.

Sincerely,



WILL TRAVIS
Executive Director

WT/TE/ra

Enc.



Making San Francisco Bay Better

**AGREEMENT WITH CONDITIONS FOR CONSISTENCY
DETERMINATION NO. CN 7-08**

December 12, 2008

United States Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105-3901

ATTENTION: Douglas E. Eberhardt, Chief, NPDES Permit Office

Dear Mr. Eberhardt:

I. Agreement

A. The San Francisco Bay Conservation and Development Commission agrees with the determination of the United States Environmental Protection Agency (EPA) that the following project is consistent with the Commission's Amended Coastal Zone Management Program for San Francisco Bay:

Location: In the Bay, at various locations in the nine Bay Area Counties

Description: Issuance of an EPA Vessel General Permit (VGP) under the National Pollution Discharge Elimination System (NPDES) permit program pursuant to section 402 of the Clean Water Act (CWA), 33 U.S.C. §1342, to regulate discharges incidental to the normal operation of commercial vessels 79 feet or greater in length, except non-ballast water discharges from commercial fishing vessels and discharges from recreational vessels (73 Fed. Reg. 34296-34304, July 17, 2008).

B. This agreement is given based on the information submitted by the U.S. EPA in its letter dated September 2, 2008 on the proposed VGP, subject to conditions contained herein that must be incorporated into the final VGP for the permit to be consistent to the maximum extent practicable with the enforceable policies of California's approved Coastal Zone Management Program for San Francisco Bay, and State water quality laws. BCDC retains the right to reopen, revise or revoke this consistency determination if the terms and conditions of the final VGP are modified substantially.

II. Findings and Conditions

A. **Legal Authority and Project Background.** On September 2, 2008, BCDC Executive Director Will Travis received a determination from the U.S. EPA Region IX that its proposed Vessel General Permit for Discharges Incidental to the Normal Operation of Commercial Vessels, issued under the National Pollution Discharge Elimination System permit program is consistent to the maximum extent practicable with the enforceable policies of California's approved Coastal Zone Management Program (CZMP) under section 307(c)(1) of the Coastal Zone Management Act (CZMA). EPA requested BCDC to review and, if necessary, issue conditions to concur with EPA's consistency determination. The Commission, pursuant to the CZMA is required to review federal projects within San Francisco Bay, and agree or disagree with the federal agency's determination that the project is consistent with the Commission's Amended CZMP for San Francisco Bay. This letter constitutes such review and comment.

LETTER OF AGREEMENT WITH CONDITIONS FOR
CONSISTENCY DETERMINATION NO. CN 7-08
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December 12, 2008
Page 2

Generally, the VGP increases protection of coastal waters by subjecting certain vessel discharges (28 in all), currently not subject to regulation under the NPDES permit program, to enforceable permit limits. However, discharges from certain vessels under the VGP would be inconsistent with California laws regulating ballast water, graywater and other discharges. Therefore the Executive Director is concurring with EPA's consistency determination administratively subject to the condition that the final VGP is modified to be consistent with the State's CZMP and State law water quality laws.

The VGP is issued pursuant to EPA's NPDES permit program under section 402 of the Clean Water Act, 33 USC § 1342. The VGP is a federal activity that is subject to the Commission's federal consistency authority under CZMA section 307(c)(1). The CZMA requires consistency determinations from state coastal management agencies for federal agency activities that are national or regional in scope under 15 CFR §§ 930.31(d) and 930.36(e). The CZMA authorizes BCDC to review EPA's VGP to determine if it is consistent with the enforceable policies of California's Coastal Zone Management Program to the maximum extent practicable, and issue conditions if necessary. The EPA must incorporate any conditions issued by BCDC into the general permit. The enforceable policies of California's CZMP include the standards and policies of the McAtter-Petris Act, the San Francisco Bay Plan and BCDC regulations.

Section 301(a) of the CWA prohibits the discharge of pollutants into the waters of the United States, including the 3-mile territorial sea, without a NPDES permit. Discharges incidental to the normal operation of vessels were excluded from the NPDES permitting program by regulations issued by the EPA in 1973 under 40 CFR §122.3(a). This regulatory exclusion was struck down by a U.S. District Court in 2005 (*Northwest Environmental Advocates, et al. v. EPA*, 2005 WL 756614 (N.D. Cal)), and the decision was affirmed on appeal by the 9th Circuit in 2008. The Court gave EPA until September 30, 2008 to vacate the regulatory exclusion. The date was subsequently extended to December 19, 2008. The court found that EPA regulations excluding discharges incidental to the normal operation of a vessel from the NPDES permit program violated the CWA requirement for NPDES permits for the "discharge of any pollutant into navigable waters from any point source," including "a vessel or other floating craft" under 33 USC §§ 1362(12)(A) and 1362(14). The EPA must issue a permit by December 19, 2008 for 28 types/categories of discharges incidental to the normal operation of vessels or those vessels will be in violation of the CWA. Any conditions issued by BCDC must be incorporated into the VGP by the EPA before December 19, 2008, because of the court-imposed deadline.

In July 2008, the Clean Boating Act of 2008 was signed into law (P.L. No 110-288) exempting recreational vessels from NPDES permit requirements; instead it authorized the Coast Guard to issue regulations implementing EPA best management practices for recreational vessels. Congress also imposed a 2-year moratorium on NPDES permits for vessels of less than 79 feet and non-ballast water discharges from commercial fishing vessels (P.L. No. 110-299). Therefore, recreational vessels, non-ballast water discharges from fishing vessels, and vessels less than 79 feet in length are excluded from the proposed VGP at this time.

EPA has determined that the issuance of the VGP is consistent to the maximum extent practicable with the enforceable policies of California's approved CZMP for a number of reasons. Vessel discharges under the VGP are currently not subject to NPDES permit requirements. Therefore, EPA states that, "upon final issuance, the permit will provide increased protection to coastal waters by imposing enforceable NPDES permit limits on those discharges. In addition, the permit establishes technology-based effluent limitations based upon CWA section 304(b)(2), ensures that vessel discharges will be in compliance with applicable

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State water quality standards under section 303, and establishes requirements for ... monitoring and inspections. In addition, ... under CWA section 401 ... the State of California has been asked to certify that the permit will comply with State water quality standards and other appropriate requirements of State law, and the final permit, when issued, will incorporate applicable requirements or conditions required by that certification."

The VGP would incorporate the Coast Guard mandatory ballast water management and exchange standards and add some additional requirements for ballast water management. It would provide technology-based effluent limits, mostly in the form of Best Management Practices (BMPs), for 28 types of discharges including ballast water, deck runoff, bilgewater, hull leachate, underwater husbandry, and cathodic protection. The effluent limits are intended to control a variety of materials discharged incidental to the normal operation of vessels classified into 7 major groups: Aquatic Nuisance Species (ANS or invasive species), conventional pollutants (BOD, oil and grease, pH, TSS), metals, nutrients (nitrogen and phosphorus), pathogens (E. Coli and fecal coliform), and other toxic and non-conventional pollutants with toxic effects (including phthalates, phenol, tetrachloroethylene, chlorine residuals, and chlorides). The permit also establishes additional technology-based requirements for certain discharges from 8 specific classes of vessels, including cruise ships, research vessels, and large ferries, and water quality-based effluent limits for impaired waters. Certain discharge types would be limited or prohibited in nearshore waters and waters protected for conservation purposes such as national marine sanctuaries and national parks. The VGP would also establish specific corrective actions, inspections and monitoring requirements as well as recordkeeping and reporting requirements. The VGP would require a submission of a Notice of Intent (NOI) for vessels greater or equal to 300 gross tons or with a ballast water capacity of at least 8 cubic meters. EPA estimates that this requirement would affect 44,363 domestic and 7,834 foreign flagged vessels. All other vessels covered by the VGP would not have to submit an NOI. In all, the EPA estimates that approximately 91,000 U.S. flagged vessels and 7,000 foreign flagged vessels may be eligible for coverage under this permit. Discharges not authorized under the VGP include discharges from vessels not operating as a means of transportation (such as seafood processing facilities, casinos, or oil and gas exploration facilities), sewage discharges, used or spent oil, garbage or trash, photo processing wastes, effluent from dry cleaning operations, medical wastes; and discharges of noxious liquid substance residues. As noted earlier, the VGP does not apply to commercial vessels less than 79 feet, non-ballast water discharges from commercial fishing vessels and discharges from recreational vessels.

The VGP comes before BCDC under its federal consistency authority pursuant to section 307(c)(1) of the CZMA. Section 307(c)(1) requires "each federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs." The VGP affects the land and water uses and natural resources of the Bay, primarily the Bay's wildlife and water quality, and therefore must be reviewed under the Commission's federal consistency authority.

California's CZMP for San Francisco Bay addresses water quality under section 66605(d) of the McAteer-Petris Act. Section 66605(d) requires that activities in the Bay "must minimize harmful effects," including "the reduction or impairment of the volume surface area or circulation of water, water quality, fertility of marshes or fish or wildlife resources, or other conditions impacting the environment." The Bay Plan requires that "Bay water pollution should be prevented to the greatest extent feasible," and that "water quality in all parts of the Bay should be maintained at a level that will support and promote the beneficial uses of the Bay as

LETTER OF AGREEMENT WITH CONDITIONS FOR
CONSISTENCY DETERMINATION NO. CN 7-08

United States Environmental Protection Agency,

Region IX

December 12, 2008

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identified in the San Francisco Bay Regional Water Quality Control Board's Water Quality Control Plan, San Francisco Bay Basin, and should be protected from all harmful or potentially harmful pollutants." The Bay Plan calls upon BCDC to utilize the policies, recommendations, decisions, advice and authority of the State Water Resources Control Board as the basis for carrying out the Commission's water quality responsibilities. In addition, section 307(f) of the CZMA provides that the State's water quality requirements under the CWA "shall be incorporated in any program developed pursuant to this title [CZMA] and shall be the water pollution control ... requirements applicable to such program."

BCDC has consulted with the State Water Resources Control Board regarding the VGP and compliance with state water quality requirements. The State Board has not yet issued a Water Quality Certification that the VGP meets state water quality standards under section 401 of the CWA. While the VGP generally increases the protection of Bay water quality and resources by imposing NPDES requirements on discharges that were not previously subject to regulation, it also allows some discharges to exceed state requirements that could harm Bay water quality and resources. Therefore, the Commission is issuing this consistency determination with conditions to ensure compliance with CZMP water quality policies and state water quality requirements.

B. Conditions for Consistency Concurrence. BCDC has reviewed the proposed VGP and determined that the following conditions minimize harmful effects, prevent pollution to the greatest extent feasible, reduce the impairment of water quality and other resources of the Bay, promote beneficial uses of the Bay, protect the Bay from harmful pollutants, and are consistent with State and regional Water Board policies and requirements under the CWA. Therefore, the Commission finds that with the following conditions, the proposed VGP is consistent with the enforceable policies of the San Francisco Bay segment of the California Coastal Zone Management Program to the maximum extent practicable.

1. **Treated Bilgewater and Hazardous Wastes:** The VGP prohibits vessels greater than 400 gross tons from discharging untreated bilgewater in all waters. However, treated bilgewater containing up to 15 ppm of oil may be discharged within 1 mile of shore in the Bay if necessary to maintain the safety and stability of the ship. Treated bilgewater also may be discharged more than 1 mile from shore so long as the vessel is underway and sailing at least 6 knots. The VGP therefore allows vessels greater than 400 gross tons to discharge treated bilgewater while underway in certain areas in the South, Central and North Bay, and the Suisun Bay that are more than 1 mile from shore. The oil discharged in treated bilgewater could adversely affect these and other areas of the Bay contrary to Public Resources Code § 72400, which prohibits the discharge of oily bilgewater, hazardous waste, other waste, and sewage sludge from oceangoing ships of 300 gross tons or more within the marine waters of the State, including coastal waters.

Condition: To comply with State law and the policies of the California CZMP, the VGP should be modified to prohibit the discharge of treated bilgewater and hazardous wastes as defined in Public Resources Code §72410(e) and (l) from large vessels of 300 gross tons or more within San Francisco Bay except in emergencies or to maintain the safety and stability of the ship.

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2. **Ballast Water:** The VGP would allow large commercial vessels in the Bay to discharge ballast water in the Bay subject to certain limitations, including at-sea ballast water exchange. Ballast water is a major vector for the introduction of Aquatic Nuisance Species (ANS or invasive species) in San Francisco Bay. It is estimated that 1 new ANS is introduced into the Bay every 14 weeks causing severe environmental and economic harm. According to the State Lands Commission, ballast water exchange should be considered only an interim ballast water management tool because of inefficiencies, ineffectiveness and operational limitations. For this reason, California enacted the Coastal Ecosystems Protection Act of 2006 with stringent performance standards to remove invasive species from ballast water. The Act, under Public Resources Code §71205.3, establishes a schedule that requires all ballast water discharges in State waters to have zero detectable levels of all organism size classes by the year 2020.

Condition: To comply with State law and the water quality policies of the California CZMP, the schedule for implementing State ballast water performance standards contained in the Coastal Ecosystem Protection Act under Public Resources Code § 71205.3 should be incorporated into the VGP for San Francisco Bay.

3. **Graywater:** The VGP would require all vessels to "minimize" graywater discharges while in port in the Bay. Vessels larger than 400 gross tons may discharge graywater more than 1 mile from shore while underway. Graywater from cruise ships are required to meet certain effluent standards within 1 mile of shore, and cruise ships may discharge untreated graywater beyond 1 mile while underway and sailing at least 6 knots. The VGP therefore allows the discharge of graywater, and graywater mixed with sewage, within ports and certain areas in the South, Central and North Bay, and the Suisun Bay that are more than 1 mile from shore. Graywater may contain pollutants that adversely impact Bay resources and water quality contrary to the policies of the California CZMP and the Coastal Ecosystems Protection Act of 2006. Pursuant to Public Resources Code § 72423, the Act requires oceangoing ships with sufficient holding tank capacity and capability for transfer to either hold on board or transfer sewage and graywater to a pumpout facility if available, and prohibits the discharge of sewage or graywater within the marine waters of the State. It also requires such discharges to be reported to the State Office of Emergency Services under Public Resources Code § 72421.

Condition: To comply with State law and the California CZMP, the VGP should be modified to prohibit the discharge of graywater in San Francisco Bay from all oceangoing ships as defined in Public Resources Code § 72410(j) that have sufficient holding tank capacity and capability for transfer to either hold on board or transfer graywater to a pumpout facility, and to require such discharges to be reported to the State Office of Emergency Services.

C. **Listing with the Commission.** Pursuant to Regulation Section 10620, the VGP was listed with the Commission on November 21, 2008.

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Executed in San Francisco, California, on behalf of the San Francisco Bay Conservation and
Development Commission on the date first above written.



WILL TRAVIS

Executive Director

San Francisco Bay Conservation and
Development Commission

WT/TE/ra

cc: San Francisco Bay Regional Water Quality Control Board,
Attn: Certification Section
Environmental Protection Agency, Attn: Eugene Bromley

EXHIBIT B

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January 15, 2009

Via FedEx Overnight Mail

Dorothy Rice
Executive Director
State Water Resources Control Board
1001 "I" Street
Sacramento, CA 95814

Re: **Petition for Reconsideration/Review of State Water Resources Control Board
Order for Clean Water Act Section 401 Water Quality Certification**

Dear Ms. Rice:

Enclosed please find a copy of a Petition for Reconsideration/Review of the State Water Resources Control Board's ("State Water Board") Order for Clean Water Act Section 401 Water Quality Certification, issued with respect to the EPA's recently-finalized National Pollutant Discharge Elimination System General Permit for Discharges Incidental to the Normal Operation of Vessels ("Vessel General Permit"). The Petition is being filed with the State Water Board's Office of Chief Counsel on behalf of our client, the Pacific Merchant Shipping Association.

Pursuant to applicable regulations, we are hereby requesting that the State Water Board ~~prepare a copy of the Staff Record with respect to its issuance of the above-noted Water Quality~~ Certification. If you have any questions regarding this request, or the Petition in general, please do not hesitate to contact the undersigned.

Very truly yours,

B. R. Ogilby

Barry R. Ogilby

BRO:ckd
Enclosure

EXHIBIT B

EXHIBIT C

1 COOPER, WHITE & COOPER LLP
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3 Walnut Creek, California 94596
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5 Attorneys for Petitioner PACIFIC MERCHANT
SHIPPING ASSOCIATION
6
7

8 BEFORE THE CALIFORNIA
9 STATE WATER RESOURCES CONTROL BOARD
10

11 In the Matter of the Petition for
Reconsideration/Review by PACIFIC
12 MERCHANT SHIPPING ASSOCIATION of
the State Water Resources Control Board's
13 Order for Clean Water Act Section 401 Water
Quality Certification for the EPA's Vessel
14 General Permit
15

MATTER NO.

DECLARATION OF JOHN BERGE IN
SUPPORT OF REQUEST FOR STAY

16
17 I, John Berge, hereby declare as follows based on personal knowledge, or where noted
18 based on information and belief:

19 1. I am the Vice President of the Pacific Merchant Shipping Association ("PMSA"), a
20 non-profit maritime trade association consisting of approximately 30 member companies which
21 own or operate commercial oceangoing vessels routinely operating in California waters, or which
22 serve as agents with respect to such entities. In this capacity, I am generally knowledgeable
23 regarding the United States and international shipping industries. I also have particular knowledge
24 regarding the nature of operations conducted by PMSA-member companies.

25 2. I was primarily responsible for preparing the public comments submitted on behalf
26 of the PMSA with respect to (1) the EPA's initial proposal to develop a National Pollutant
27 Discharge Elimination System ("NPDES") General Permit for Discharges Incidental to the
28 Normal Operation of Vessels (the "Vessel General Permit") in June 2007, and (2) the proposed

1 Vessel General Permit ultimately issued by the EPA for notice and comment in June 2008. As
2 such, I am familiar with the terms and conditions contained in the Vessel General Permit and their
3 potential impact on PMSA-member companies and other members of the ocean shipping
4 community operating in California waters.

5 3. I was also in periodic contact with staff at the State Water Resources Control Board
6 ("State Water Board") who were charged with preparing a response to the EPA's application for a
7 Clean Water Act Section 401 Water Quality Certification with respect to the Vessel General
8 Permit (the "401 Certification"). I was not personally aware of the significant additional
9 conditions which the State Water Board sought to include in the Vessel General Permit as
10 conditions to certification until December 12 and related concerns to Board staff about the
11 extensive sampling and analysis provisions. The document was issued in final by the State Water
12 Board's Executive Director on December 17, 2008. I do not believe that the State Water Board
13 ever issued for formal public notice and comment a proposed version of the 401 Certification.

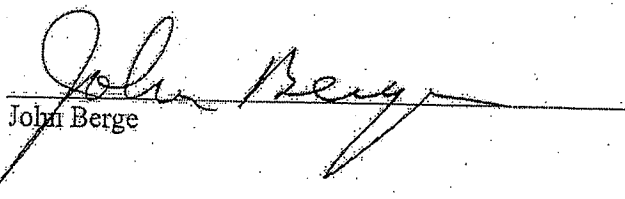
14 4. Oceangoing vessels, including those operated by PMSA-member companies, have
15 historically been excluded from the Clean Water Act's NPDES permitting program pursuant to
16 regulations promulgated by the EPA. As such, there is no precedent for the regulation of routine
17 discharges from such vessels under the NPDES program at either the federal or state level. It is
18 ~~my belief that prior to implementing the additional conditions imposed by the State Water Board~~
19 which are subject to the instant Petition for Reconsideration/Review, PMSA-member companies
20 and other owners and operators of covered vessels operating in California waters will need to
21 perform the following activities: (1) evaluate the numerical effluent limitations added by the State
22 Water Board to determine which of the broad range of constituents, if any, will pose compliance
23 issues and possible installation of onboard sampling ports, piping, valves, treatment systems, etc.;
24 (2) clarify with the State Water Board the scope of the newly-imposed sampling, monitoring and
25 reporting requirements, many of which are ambiguous and/or subject to multiple interpretations;
26 (3) work in conjunction with the State Water Board (and potentially the EPA) to develop standards
27 and protocols governing the stationary and in-transit sampling of effluent from certain vessel
28 discharge categories; (4) make any vessel modifications determined to be necessary to ensure

1 compliance with the newly-imposed conditions; and (5) complete the training of onboard vessel
2 personnel who will be responsible for conducting the required sampling, monitoring and reporting.
3 These activities cannot be completed by February 6, 2009, the date when the Vessel General
4 Permit (including the additional conditions imposed by the State Water Board) will currently
5 become effective pursuant to court order. Without a stay of the disputed additional conditions,
6 PMSA-member companies and other covered oceangoing vessels operating in California waters
7 will be faced with the prospect of operating in California without certainty of compliance. More
8 than 42% of all containerized imports into the United States arrive through California Ports.

9 5. I do not believe that a decision to stay the disputed conditions will result in harm to
10 the public interest. PMSA's stay request only pertains to a portion of the additional conditions
11 included by the State Water Board in its 401 Certification. It will not impact the ongoing validity
12 of those requirements in the EPA's Vessel General Permit that apply nationwide, or to those
13 additional conditions imposed by the State Water Board that are not subject to the instant Petition
14 for Reconsideration/Review. In short, discharges from covered vessels operating in California
15 waters will be highly regulated while any stay is pending. By helping to avoid potential
16 disruptions within the shipping industry, a stay should also lessen any potential adverse impacts to
17 those sectors of the California economy which rely heavily on oceangoing vessels for the import
18 or export of goods.

19 I declare under the penalty of perjury under the laws of the State of California that the
20 foregoing is true and correct.

21 DATED: January 15, 2009

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23 
24 John Berge
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